TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 19

NATIONAL UNION OF MARINE COOKS AND STEWARDS, A VOLUNTARY ASSOCIATION, PETITIONER,

vs.

[illegible] ARNOLD, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JANUARY 11, 1954

CERTIORARI GRANTED MARCH 1, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

NATIONAL UNION MARINE COOKS & STEWARDS, ET AL., PETITIONERS,

vs.

GEORGE ARNOLD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 7, 1953.

—1935

[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

GEORGE ARNOLD, et al., Plaintiffs,

vs.

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, et al., Defendants

JUDGMENT—September 4, 1951

The above cause came regularly on for trial before the undersigned Judge of the Superior Court of the State of Washington for Spokane County, sitting in King County, with a jury, on Monday, June 4, 1951, at 10:00 A.M.; some of the plaintiffs being present in person and all of them being represented by Samuel B. Bassett and John Geisness, their attorneys; defendant National Union of Marine Cooks & Stewards, a voluntary association, impleaded herein as National Union of Marine Cooks & Stewards Association, a voluntary association, being represented by George R. Andersen and John F. Walthew, its attorneys; and defendant Joseph Harris being represented by John Caughlan, his attorney; and the cause having been duly and regularly tried before a jury properly impaneled and sworn to try the same; and the said jury having returned a verdict in favor of each plaintiff in the sum of $5000.00; and the motions of defendants for judgment N.O.V. and for a new trial having been argued, considered and denied, it is now ordered, adjudged and decreed:

That plaintiff George Arnold have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Alvin Bailey have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John C. Baine have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff B. F. Barrett have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 2] That plaintiff Dale A. Becks have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Don Bickford have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Charles Birdsall have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Elmer J. Blanes have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George C. Boettger have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Gerald Bosley have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Carol E. Campbell have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff A. W. Charlesworth have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Burr D. Cline have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Joseph Cline have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert Cooney have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff J. R. Costello have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harold S. Darling have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George Davey have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Eugene A. Douglas have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Dean H. Douglas have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 3] That plaintiff Howard Dow have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Roger Dyer have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Dewey Erlwein have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Francis Forde have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Willard S. Francis have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert C. Friend have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert Galbraith have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William C. Game have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Joseph Green have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George Heard have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Ernest Henry have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Herbert Hill have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff T. J. Howard have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William Jenkins have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert Jewell have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Edsel Johns have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 4] That plaintiff Arnold W. Johnson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Charles L. Johnson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank Johnson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff A. L. Jones have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Art D. King have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harold Krause have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harley E. Krone have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank Lachica have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William Lande have and recover of and from the defendant and each and both of them the sum of $5000.00;

That plaintiff Percy Landrigan have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Marvin F. Lantz have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Louis Larsen have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Cliff Lattish have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jose Lorente have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Cy Lord have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Norman Maginn have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 5] That plaintiff A. L. Makenson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff J. Ralph Mann have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Tony Manzano have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Tom McCaffery have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Hugh McIntyre have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Thomas C. McMannus have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William B. Miller have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff C. C. Moody have and recover of and from

the defendants and each and both of them the sum of $5000.00;

That plaintiff Charles Mosher have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Al Mundt have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George O'Leary have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harold Paige have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Bernard M. Paluck have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jack Patterson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank C. Ponce have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Clarence Reese have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 6] That plaintiff G. Responte have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Virgil Rogers have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jack Roper have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Dan Rotan have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Don Rotan have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Clarence Rothaus have and recover of and

from the defendants and each and both of them the sum of $5000.00;

That plaintiff Mathias Sabo have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff H. J. Schuchard have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank Schulpeck have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Ernest Shearer have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Siewick have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Gus Sinclair have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff A. Sirriani have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Leslie Smith have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Smocsyk have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Fred Starks have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 7] That plaintiff Les Taft have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jack Taylor have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff James Triana have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Don W. Tyler have and recover of and

from the defendants and each and both of them the sum of $5000.00;

That plaintiff Daniel Varady have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Pedro Villabol have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Hubert Whaley have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Al Baide have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Boers have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Max Schlossel have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Carl W. Singer have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiffs have and recover of and from the defendants and each and both of them the costs and disbursements of this action.

Done in open court this 4th day of September, 1951.

Carl C. Quackenbush, Judge.

Copy rec'd this 28th day of August, 1951. John Caughlan, Attorney for defendant, Joseph Harris.

Presented by: John Geisness, of Attorneys for Plaintiffs.

Approved as to form: —— ——, Attorneys for Defendant Union; —— ——, Attorney for Defendant Harris.

Copy received Aug. 28, 1951. Walthew, Gershon, Yothers & Warner Z. Trimble.

[fol. 8] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT—Filed September 5, 1951

To George Arnold, et al., plaintiffs above named, and to each and every one thereof, and

To Bassett & Geisness, their attorneys:

You, and each of you are hereby notified that the above named defendants do hereby appeal to the Supreme Court of the State of Washington from that certain judgment entered in this cause on the 5th day of September, 1951, and from each and every part thereof.

Dated at Seattle, Washington, this 5th day of September, 1951.

Walthew, Gershon, Yothers & Warner, attorneys for National Union of Marine Cooks & Stewards Association, defendant, and John Caughlan, attorney for defendant Joseph Harris.

[fol. 9] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Title omitted]

ADJUDICATION OF CONTEMPT—April 4, 1952

This matter came regularly before the above entitled Court upon an order requiring the defendant National Union of Marine Cooks & Stewards, a voluntary association, impleaded as National Union of Marine Cooks & Stewards Association, to show cause why it should not be adjudged in contempt of court for its failure to comply with the order of this Court, made and entered February 11, 1952, appointing a receiver herein and directing the transfer of certain assets, and by reason of its failure to assign, transfer and deliver the bonds therein mentioned to such receiver and

further to show cause why said receiver should not be authorized and directed to exercise further powers as receiver and why said defendant and others should not be enjoined and restrained in certain respects, and the matter having been argued on March 14, 1952, at the hour of 2:00 p. m., the return time fixed by said order, and having been thereupon postponed to March 28, 1952, at 2:00 p. m., and having again come on for hearing at said time, the plaintiffs being represented by their attorneys Samuel B. Bassett and John Geisness, and the defendant voluntary association not appearing but certain individual officers of said defendant association being represented by John Caughlan and Siegfried Hesse, their attorneys, and certain proposed intervenors being represented by Sarah H. Lesser, their attorney, and the Court having heard and considered the statements and arguments of counsel, and having examined the files and records herein and the affidavit of said receiver submitted in support of his motion for said order to show cause, and other evidence herein, the Court finds that said [fol. 10] defendant voluntary association has wilfully and contemptuously failed and refused, and still fails and refuses, to deliver to said receiver certain United States bonds, although expressly ordered to do so by an order made and entered in the above entitled cause February 15, 1952, and although certified copies of said order were served upon said defendant voluntary association, as appears by return and affidavit of service on file herein, and it further appearing that said voluntary association has said bonds in its possession and under its control and has given no explanation or justification for its failure to assign, transfer and deliver said bonds to said receiver pursuant to said order of this Court and that written demands for delivery of said bonds, pursuant to said order, received by said voluntary association on February 23, 1952, and February 25, 1952, have been ignored, it is now, therefore,

Ordered, adjudged and decreed that the defendant National Union of Marine Cooks & Stewards, a voluntary association, impleaded herein as National Union of Marine Cooks & Stewards Association, be and the same hereby is adjudged in contempt of this Court, and that said contemptuous conduct of said defendant frustrates the enforce-

ment of the judgment herein in favor of the plaintiffs and against the defendants and frustrates the receivership created herein by order of this Court;

It is further ordered that the hearing upon the remaining issues raised by said order to show cause be and the same hereby is postponed to Friday, April 11, 1952, at the hour of 2:00 p. m.

Malcolm Douglas, Judge.

Done in open court this 4th day of April, 1952.

Presented by: John Geisness, of Counsel for Plaintiffs.

Copy Received date April 1, 1952. Firm Hatten & Lesser by Sarah H. Lesser.

Received Mar. 31, 1952. Walthew, Gershon, Oseran & Warner, Z. T.

Received Apr. 1, 1952. John Caughlan, Siegfried Hesse.

Filed 1952. Apr. 4 AM 10:06. Norman R. Riddell, Clerk, King County, Wash.

[fol. 11] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31984

GEORGE ARNOLD, et al., Respondents

vs.

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, et al., Appellants

MOTION FOR DISMISSAL OF APPEAL—Filed April 2, 1952

Come now the respondents in the above cause and respectfully move this Honorable Court as follows:

1. That the above entitled appeal of appellants and each and both of them be dismissed, or

2. That the appeal of the appellant National Union of Marine Cooks & Stewards, a voluntary organization, be dismissed, or

3. That the brief of appellants be stricken,

4. That such other order be made as to the Court may appear proper.

This motion is based upon the files and records herein and upon the affidavit of John Geisness set forth below.

Bassett, Geisness & Vance, Attorneys for Respondents.

STATE OF WASHINGTON,
County of King, ss:

JOHN GEISNESS, being first duly sworn, on oath deposes and says: In the Superior Court in King County, in the above entitled cause, being George Arnold, et al., Plaintiffs, v. National Union of Marine Cooks & Stewards Association, a voluntary association, et al., Defendants, King County Cause No. 411247, judgment was entered in favor of the [fol. 12] plaintiffs and against each and both of the defendants September 5, 1951, in the total sum of $475,000.00. The above entitled appeal is now pending from said judgment but the same has not been superseded.

Supplemental proceedings were initiated October 19, 1951, by an order issued out of said Superior Court in said cause and said order directed said association to bring certain documents. Said supplemental proceedings have at all times since been pending and are still pending. On or about November 8, 1951, a supplemental order was issued directing the association to bring certain documents listed in said order. Said association altogether failed to produce certain financial records and reports which the order directed it to produce. November 20, 1951, said Superior Court made an order requiring said association to show cause why it should not be punished for contempt of Court for failure to produce said financial records. On January 7, 1952, after due notice, said Superior Court made an order adjudging said voluntary association in contempt of court for failure to produce said documents in violation of said order and the matter was thereupon continued to January 14, 1952, to afford said voluntary association an opportunity to purge itself from such contempt and by said last mentioned date said association had purged itself of contempt by producing

said documents. On or about the 25th day of January, 1952, said Superior Court made an order directing said association to show cause why a receiver of the property of said association should not be appointed by the court.

On the 15th day of February, 1952, there was made and entered in said cause in said Superior Court an order appointing Wilbur Zundel receiver of the assets of said association and directing transfer to said receiver of United States Bonds in the total amount of $298,000.00. A true and correct copy of said order is attached hereto and marked Exhibit A and incorporated herein by this reference. On or about the 20th day of February, 1952, a cer-
[fol. 13] tified copy of said order was duly, regularly and properly served upon said association by the sheriff of King County. And on or about the 3rd day of March, 1952, a certified copy of said order was served upon the voluntary association in San Francisco, California. On or about February 21, 1952, said receiver, by a letter sent through the United States mail, demanded that said association comply with said order and assign, transfer and deliver said bonds to him. Receipts have been received showing that one of said letters was delivered to said association in Seattle, Washington on February 23, 1952, and that the other was delivered to said association in San Francisco, California on February 25, 1952.

Said voluntary association has altogether failed and refused, and still fails and refuses, to deliver to said receiver said bonds or any part of said bonds, and has given no explanation to said receiver or to the Court or to the plaintiffs in said cause or their counsel for its failure to comply with said order.

The failure of said association to comply with said order is frustrating enforcement of the judgment which is the subject of the above appeal and is frustrating the receivership created and existing in said cause in said Superior Court by virtue of said order of said court.

On or about the 4th day of April, 1952, said Superior Court made and entered its order adjudicating said association in contempt of Court for failure to deliver said bonds and further adjudicating that said defendants' contemptuous conduct frustrates the enforcement of said judgment

and frustrates the receivership created by the Court's order.

Said bonds are, and at all times herein mentioned have been, situated in San Francisco, California. Said bonds are in the custody and under the control of officers of said association who reside in California and are beyond the juris-[fol. 14] diction of said Superior Court. Said association has no substantial assets within the jurisdiction of said Superior Court and its only assets in such jurisdiction consist of furniture and equipment used in its offices and hiring hall in Seattle, Washington. Said Superior Court is unable to exercise such coercive power against said association as to compel delivery of said bonds and said association is contemptuously ignoring the aforementioned orders of said Superior Court.

This affidavit is made in support of respondents' above motion to dismiss the appeal herein or for other relief.

John Geisness.

Subscribed and sworn to before me this 16 day of April, 1952. Robert F. Sandall, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[fol. 15] EXHIBIT A TO AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 411,247

GEORGE ARNOLD, ET AL., Plaintiffs,

vs.

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, ET AL., Defendants

ORDER APPOINTING RECEIVER AND DIRECTING TRANSFER OF ASSETS

The above matter came regularly before the undersigned Judge of the above entitled Court on the 5th day of November, 1951, at the hour of 10:00 o'clock in the forenoon of

said day upon an order in supplemental proceedings directing the defendant National Union of Marine Cooks & Stewards, a Voluntary Association, impleaded as National Union of Marine Cooks & Stewards Association, a Voluntary Association, and Charlie Nichols, its Agent, to appear for examination and to bring and produce certain documents, the matter having been postponed from the original return date; oral testimony was thereupon adduced and the matter continued from time to time thereafter and further evidence, both oral and documentary, was adduced, and said proceedings finally came on for hearing Friday, February 8, 1952, at the hour of 1:30 P. M. upon further order in said proceedings requiring said defendant National Union of Marine Cooks & Stewards to show cause why a receiver of its property should not be appointed, plaintiffs appearing by their attorneys Samuel B. Bassett and John Geisness of Bassett, Geisness & Vance, and said defendant association having made a purported special appearance and motion to quash service of process and being represented by its attorney John F. Walthew of Walthew, Gershon, Oseran & Warner, and John Caughlan, in support of said purported special appearance and motion to quash; and the court having heard the arguments of [fol. 16] counsel for said defendant union in support of said motion to quash, in the course of which it was admitted by said counsel that service of said Orders to show cause was made upon the defendant association in the same manner as service of Summons and Complaint in the main action upon said defendant and that said service of said Summons and Complaint was adequate to give the court jurisdiction of said main cause and of the defendant association as a defendant therein, and having heard the arguments of counsel for plaintiffs upon the merits of said proceedings, counsel for said defendant having declined argument thereon, and having considered the testimony, oral and documentary, adduced in said proceedings, the affidavits filed therein and the other records and files therein, and being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law, now in accordance therewith, it is

Ordered that Wilbur Zundel be and he hereby is appointed receiver of the property of the defendant National

Union of Marine Cooks & Stewards, a voluntary association, with power, under the control and subject to the direction of the court, to take, care for, and keep possession of said defendant's property, books of account, and all property, books and papers relating to said defendant and its business, to collect debts and monies, to conduct the business of said defendant and possess and exercise its contract rights, and generally to do such acts as may be ordered by the court or be sanctioned by law; provided, that until further order of the court, said defendant shall be permitted to continue to operate its ordinary business and said receiver shall not take into his possession or control the business of said defendant, its books of account or papers, or its property or funds, excepting the United States bonds in the total amount of $298,000.00, hereinafter mentioned;

It is further ordered that said Wilbur Zundel, before [fols. 17-27] entering upon his duties as such receiver be sworn to perform them faithfully and execute an undertaking to the State of Washington, for the use of whomsoever may be injuriously affected by this receivership, in the amount of $1000.00, to the effect that he will faithfully discharge the duties of receiver in the action herein and obey the orders of the above entitled Court, and that said undertaking may be increased by the court from time to time in its discretion;

It is further ordered that said voluntary association shall assign, transfer and deliver to said Wilbur Zundel, as receiver, immediately upon his qualifying as such receiver, United States savings bonds, Series G, in the amount of $238,000.00 and United States Treasury 2½% bonds due June 15, 1972, in the amount of $60,000.00

Done in open court this 15 day of February, 1952.

Malcolm Douglas, Judge. Received April 17, 1952, Walthew, Gershon, Oseran & Warner, Z. T.

Presented by: John Geisness, of Attorneys for Plaintiffs.

[fol. 28] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ANSWERING BRIEF OF APPELLANTS UPON MOTION FOR DISMISSAL OF APPEAL—Filed May 15, 1952

Statement of the Case

Appellants have appealed from a money judgment, totalling $475,000, entered in favor of respondents. Briefs on behalf of all parties have been filed, and the case has been set for oral argument on the merits for next Thursday, May 22, 1952.

Appellants have not been able to supersede the judgment. Respondents instituted an action by way of supplemental proceedings, out of which arose the contempt adjudication which is the basis for the motion now before the court.

Appellant Harris has never been made a party to the supplemental proceedings. Appellant, The National Union of Marine Cooks & Stewards, appeared specially in the supplemental proceedings to contest the jurisdiction of the court, and to urge that, for the purpose of an order directing transference of $300,000 (approximately) in bonds to a receiver for respondents, jurisdiction over the person of the representatives and officers of the union who have control over the bonds in question is a prerequisite, the appellant union being a voluntary association of some 5,000 individuals. Appellants also sought to urge, in their special appearance to contest jurisdiction, that supplemental proceedings apply only to property within the state, or where an adequate remedy in the ordinary course of law does not [fol. 29] exist.

Prior to the entry of the order for transference of the bonds to the receiver, and the subsequent judgment of contempt when the bonds were not received by the receiver, respondents had commenced an action on the judgment in California, where all substantial assets of the appellant union exist. A demurrer to this action was sustained in the superior court of the state of California for San Francisco County, with leave to amend upon filing of non-resident cost bonds. Respondents failed to pursue this

action, but took a voluntary non-suit, and have commenced a substantially identical action in another county in California, where, they believe, they may not be required by the court to post non-resident cost bonds, i. e., they shopped for the most favorable forum within the state of California. Thus, respondents have an adequate remedy at law.

The real purpose of the supplemental proceedings was exposed by respondents on November 19, 1951, when they stated, through their attorneys, in open court, that if they could obtain any order of contempt, they believed that they could obtain a dismissal of appellants' appeal in the main action. This statement, we submit justifies us in asserting that respondents' prime motive in pursuing the supplemental proceedings, in full knowledge that appellants have no substantial assets in the state of Washington, was not to obtain enforcement of the judgment, which may well be reversed on appeal, but rather, to harrass appellants in their pursuit of their legal appellate remedies, in appeal from the judgment upon which the supplemental proceedings are founded.

On February 15, 1952, the superior court found, on the basis of financial reports of appellant union's assets, as of September 26, 1951, that the union then (i. e. on February 15, 1952) had certain bonds, valued at $298,000. The court entered an order that the union transfer these to a receiver [fol. 30] appointed for the respondents.

The court also found that it had personal jurisdiction of the appellant union by reason of service on a branch officer in Seattle, although the bonds were supposed to be in San Francisco, California, and the officers and representatives of union who had control of these assets all resided in California, and none of them was ever personally served with any process in the supplemental proceedings.

The order to transfer the bonds was not appealable: *State ex rel. Mangacang v. Sup. Ct.* (1948), 30 Wn. (2d) 692. Appellants were therefore faced with the alternative of complying with the order and transferring the $298,000 to the receiver, with the possibility of the funds (if they existed) being dissipated prior to the decision on appeal, or failing to comply, and appealing from an order of contempt. The latter is a recognized method of obtaining supreme court review of such an order: *State ex rel. Mangacang v.*

Sup. Ct., supra. Appellants have timely perfected their appeal from this adjudication of contempt.

We do not believe that it is appropriate to argue the appeal from the contempt adjudication in this brief. A jurisdictional issue presented on that appeal will be: When jurisdiction in supplemental proceedings depends upon personal service on a subordinate or branch officer of a voluntary association, may the voluntary association be adjudged in contempt on the failure of non-resident officers, who alone have control over bonds of the association, and who have not even been served, to transfer those bonds to a receiver appointed by the court? The issue thus presented is novel, and substantial. See: *Abbott v. Sherman Mines* (1937) 71 P. (2d) 1034, 41 N. Mex. 525.

The authorities cited by respondents in their brief are by [fol. 31] — means conclusive upon the issues which will be tendered upon appeal from the contempt order.

Argument on Motion to Dismiss

Respondents, in their motion, request three alternative actions of this court: (1) dismiss the appeal of both appellants, i. e., Harris (the agent), and the Union, (the principal); or (2) dismiss the appeal of the appellant union; or (3) strike the brief of both appellants.

The impropriety of the first and third alternatives is obvious from the fact that the motion is based solely on the alleged contempt of the appellant union (principal). Appellant Harris, (agent), has done nothing to justify such action. At best, therefore, all that respondents can request from this court is that the appeal of appellant union be dismissed, since to strike the brief of one appellant would mean striking the brief of both. The court will still have to hear argument on the appeal and decide every issue. Therefore, respondents' motion will accomplish nothing.

As was pointed out above, appellant union is pursuing an appropriate means of appealing the order upon which the contempt is based, and the only method by which the jurisdiction of the superior court may be determined. The contempt is only a necessary step to appellate review, and not a flagrant disregard of the superior court's order, as respondents attempt to characterize it. Assuming that this court

does sustain the jurisdiction of the superior court, the contempt (if any) is not of such nature as to justify the extraordinary coercive measures demanded by respondents.

It is appropriate to remind the court that respondents seek equitable relief. The cases cited and relied upon by them, with a single exception, are divorce cases. In only one case was an appeal involved, and there the appeal was [fol. 22] dismissed only conditionally.

In *State ex rel. Hunter v. Ronald* (1919), 106 Wash. 413, this court pointed out that one in contempt cannot be denied *legal rights* but only *affirmative equitable rights*. This court, having determined that a divorce action was equitable in nature, refused to compel the superior court to enter an order of non-suit or dismiss the case until the contempt was purged. Similarly, in *— ex rel. Harris v. Superior Court* (1927), 144 Wash. 229, following the *Hunter* case, this court held that a final decree of divorce need not be entered in favor of one in contempt in that divorce action.

Pike v. Pike (1946), 24 Wn. (2d) 735, is the only case cited by respondents where a motion for dismissal of appeal was involved. In a divorce action, the mother had been ordered to turn over the custody of her children to the father. The mother secreted the children and then appealed the order. This court first decided that an appeal from a *divorce* action could be dismissed. It then emphasized that appellant was affirmatively frustrating the order, and that the children's welfare would be best served by being in the custody of the father, as was determined in the superior court. Under these circumstances, this court directed dismissal of the appeal unless appellant complied with the custody order within ten days. This case involved an appeal from the very order of which the mother was in contempt.

The only other case relied upon by respondents, *Rutgers v. Walker* (1943), 19 Wn. (2d) 681, is not in point at all.

Respondents recognize that the rule invoked by them is one of equity, and applies only to cases in equity. It involves denial of affirmative equitable relief to one in contempt. It never involves denial of a defensive *legal* right. In effect, it is a particular example of the application of [fol. 33] the ancient equity maxim: "He who seeks equity must do equity."

Respondents' Motion Would Be Frivolous and Pointless

Appellant union's liability is that of a principal, for the acts of the agent, Harris (Appellant) done in the scope and course of his employment. This is not the case of liability of joint tort-feasors, but liability based upon the doctrine of respondeat superior. This means, therefore, that the liability of appellant Harris is a necessary prerequisite to the liability of appellant union. See: *Baremus v. Root* (1901), 23 Wash. 710, 716. See also: *Marshall v. Chapman's Estate* (1948), 31 Wn. (2d) 137, 146; *Ogilvie v. Hong* (1933), 175 Wash. 209, 215; and Mechem: *On Agency* (2d Ed.), sec. 2012.

There is nothing to justify dismissal of appellant Harris' appeal. Nor can the union's brief be stricken without also striking appellant Harris' brief. If Harris should prevail, the basis of the union's liability would be gone. Since this is the case, the dismissal of the union's appeal would actually accomplish nothing.

The Equities Urged Do Not Favor Respondents in the Present Case

The rule sought to be applied in this case is applicable only to proceedings in the same action. "The rule is limited to the proceedings in the case in which the contempt occurred." 17 C. J. S. P. 139 (Contempt, sec. 97). See: e. g., *Montgomery v. American Employers' Ins. Co.* (D. Del. 1938), 22 F. Supp. 476, affirmed 101 F. Second 1005; Cert. denied, 307 U. S. 629, 83 L. Ed. 1512. This is simply an expression of the general rule in equity that the doctrines of "doing equity" and "clean hands" apply only to the particular cause in dispute.

[fol. 34] Supplemental proceedings are a separate action or actions, although a judgment is ordinarily a precondition. See: *Hamburger Apparel Co. v. Werner* (1943), 17 Wn. (2d) 310.

This is stated in 21 Am. Jur., p. 314 (Executions, sec. 658):

> . . . The proceeding had been declared auxiliary to and a part of the original action in the sense that it takes the same number on the docket, but it is essentially a new

and independent action in the sense that it involves the determination of new and different issues, all of which are foreign to those in the original case. . . .

The distinction between the action, upon which this appeal is based, and the supplemental proceedings, from which the contempt arose, is further emphasized by the fact that the former is a strictly legal action, while the latter is essentially an action in equity. Appellants have done nothing in the main action which would justify the dismissal of their appeal in that action.

The rule applies only to affirmative equitable action, and not to matters of defense. Matters of right are not denied under the rule respondents seek to evoke. This appeal is from a judgment in an action at law. An appeal from a judgment at law is purely a matter of defense; it is not a matter of grace, nor an application for affirmative equitable relief. This distinction is fundamental. See: *Kelly v. Kelly* (1932), 258 NYS 367, 17 C. J. S. p. 139 (Contempt, sec. 97). We doubt that there is inherent power to deny a person in contempt the right to defend an action against him, for this would involve the taking of his property without due process of law, in violation of the Fourteenth Amendment. See: *Peters v. Berkeley* (1927), 219 NYS 709; *Maran vs. Maran* (1910), 122 NYS 9. The rule does not apply where the interest of more than the person in contempt would be involved.

Respondents seek not only to dismiss appellant union's appeal, or strike its brief, but they also want to deny appel- [fol. 35] lant Harris, his appellate remedies. This is improper, since appellant Harris is not in contempt. Further, to strike appellant union's brief would necessarily require the striking of appellant Harris' brief.

Appellant union is an unincorporated association, which may be made party to a suit by serving its officers. See: *St. Germain v. Bakery and C. Workers Union* (1917), 97 Wash. 282. The judgment against the union binds the joint assets of all its members. To dismiss the appeal is to prejudice the interests of those represented who are not in contempt of court. Faced with a clearly analogous situation involving a corporation, the New Mexico Supreme Court held that "where there are several defendants representing not only themselves, but other members of an

organization to which they belong, the court cannot strike out defenses standing for the benefit of all the defendants because some are in contempt." *Abbott v. Sherman Mines* (1937), 71 P. (2d) 1031, 41 N. M. 525. This reasoning is all the more applicable to the present case wherein the defendant is an unincorporated organization.

If respondents' position is followed to its logical conclusion, this court could, in effect, hold that a defendant who failed to supersede a money judgment against him could be compelled to satisfy the judgment. Any order in supplemental proceedings that the judgment debtor satisfy the judgment, is not complied with, could result in an adjudication of contempt. No matter how erroneous the judgment of contempt, such judgment would stand as a bar to any appeal from the money judgment. Respondents cite no authority for such a sweeping proposition.

It is respectfully submitted that respondents' motion should be denied in its entirety.

Accepted by —— ——, Attorneys for Respondents.

Respectfully submitted, John Caughlan, Attorney for Appellants.

[fols. 36-37] [File endorsement omitted.]

[fol. 38] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER ON MOTION TO DISMISS APPEAL—May 17, 1952

It appearing to this court that the appellant National Union of Marine Cooks & Stewards, a voluntary association, has been adjudged in contempt of the Superior Court of the State of Washington for King County by order made and entered by that Court in its Cause No. 411247, on the 4th day of April, 1952, and that said contemptuous conduct of said appellant frustrates the enforcement of the judg-

ment from which the present appeal has been taken to this Court, which judgment has not been superseded; and it further appearing to this Court that the National Union of Marine Cooks & Stewards, a voluntary association, has appealed to this Court from the said order of April 4, 1952,

Now, therefore, it is ordered and directed this 17th day of May, 1952:

1. That this appeal will not be heard on May 22, 1952, and it is stricken from the Court calendar for that day, and will not be heard until the said adjudication of contempt has been affirmed or reversed; unless the said appellant Union sooner purges itself of the contempt of which it is adjudged to be guilty by the said order of April 4, 1952.

[fol. 39] 2. That a ruling on the respondents' motion to dismiss the present appeal will be held in abeyance until the determination of the appeal in the contempt proceeding.

Matthew W. Hill, Acting Chief Justice; Joseph A. Mallery, Thomas E. Grady, Charles T. Donworth, Frank P. Weaver.

[fol. 40] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

SUPPLEMENTAL MOTION FOR DISMISSAL OF APPEAL—Filed May 29, 1952

Come now the respondents, renew their motion for dismissal of the appeal herein and, if said motion be denied or undetermined, respectfully move this Honorable Court for an order directing the appellant association to deliver to Wilbur Zundel, as its receiver, the United States Bonds mentioned in the order of the Superior Court in the above cause made and entered February 15, 1952; and directing the said Superior Court not to authorize any payment or distribution to creditors by said receiver until further order of this

Court; and dismissing the appeal now pending in this cause on a designated future date, unless in the meantime the said appellant delivers said bonds to said receiver and files in this Court evidence of such delivery.

This supplemental motion is based upon the records and files herein, the affidavit supporting the original and pending motion for dismissal of the appeal and upon the affidavit of John Geisness set forth below.

Bassett, Geisness & Vance, Attorneys for Respondents.

STATE OF WASHINGTON,
County of King, ss:

John Geisness, being first duly sworn, on oath deposes and says:

On the 19th day of May, 1952, this Court made an order [fols. 41-47] in the instant case striking this cause on the merits from the calendar and deferring disposition of respondents' motion to dismiss the appeal in the instant case until final determination of an appeal in a certain contempt proceeding.

Respondents filed a motion to dismiss the appeal in the contempt proceeding upon the ground that the appeal was not taken within the time allowed by law. Said motion will be noticed for hearing before this Court upon the same date as the motion and supplemental motion for dismissal of the appeal in the instant case are noticed for hearing.

John Geisness.

Subscribed and sworn to before me this 23rd day of May, 1952. J. Duane Vance, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 48] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

APPELLANTS' BRIEF IN OPPOSITION TO SUPPLEMENTAL MOTION FOR DISMISSAL OF APPEAL—Filed June 13, 1952

[Title omitted]

Introduction

The supplemental motion to dismiss appellants' appeal from judgment in the sum of $475,000 against them:

(i) Removes the motion for dismissal of appeal . . . and, if said motion be denied or undetermined . . .

(ii) Moves for an order directing [the appellant union] to deliver to Wilbur Zundel, as its receiver, the United States bonds mentioned in the order of the Superior Court in the above cause made and entered February 15, 1952; and

(iii) [Modifying the order of the superior court] by directing the said Superior Court not to authorize any payment or distribution to creditors by said receiver until further order of this court; and

(iv) Dismissing the appeal . . . unless [by a designated future date] the appellant delivers said bond to said receiver . . .

It is clear that respondents' position before this court is as follows:

(1) An ordinary money judgment may be enforced by contempt proceedings. (Respondents have an ordinary judgment for money. The bonds referred to in the order of February 15, 1952, never belonged to respondents. They were not the subject of the action.)

(2) An Appellant may be *required* to supersede a judgment, in full or in part, as a prerequisite to the hearing of his appeal. (Since respondents now specifically ask that the receiver hold funds paid to him, and that he not be authorized to distribute such funds to the judgment cred-

itors, pending determination of this appeal, it is obvious [fol. 49] that respondents are asking for a partial supersedeas as a precondition to the hearing of the appeal.)

(3) An appellant may be stripped of substantial *defensive* right by reason of an adjudication of contempt (i. e., failure to pay in cash to a receiver a substantial portion of the money judgment against the said appellant.

Certain other things are apparent from the motion now presented to the court. First, respondents desire to prevent appellant union from ever being able to appeal the contempt adjudication upon which respondents base their claim that the princial appeal should be dismissed. Second, they seek to invoke the coersive powers of the Supreme Court of the State of Washington in contempt proceedings without affording appellants a hearing. It is a matter of doubt whether appellants had the bonds described in the order of February 15th, 1952, at the time that order was made, or for many months prior to that time. Therefore, an order of this court directing the transfer of such bonds to a receiver, and preconditioning the hearing of the appeal upon such transfer, would strip appellants of a substantial defensive right without notice or hearing.

The Motion to Dismiss Should Be Denied and the Appeal Should Be Recalendared for Hearing on the Merits

(a) The granting of respondents' motion would deprive appellants of property without due process of law, and would deny to them the equal protection of the law.

Respondents state:

> **"Our supplemental motion in this case renews the original motion to dismiss the appeal, on the assumption that the appeal from the contempt adjudication will be dismissed."**

[fol. 50] If respondents' theory is correct, appellants are to be denied an appeal because the adjudication of contempt will never become final. The adjudication will (on respondents' theory,) never become final because respondents will gladly "trade" any possible "coercion" offered

thereby the superior court for dismissal of appellants' appeal in the main action without a hearing!

Respondents state that they desire "to obviate the necessity of a long delay pending appeal from the adjudication of "contempt," and "it seems . . . that there is no necessity to argue further appellants' contempt even if the appeal is not dismissed." Stated otherwise, respondents will gladly allow the Supreme Court to enter judgment against appellants, ordering appellants to turn over $298,000,000, and prejudging them to be in contempt upon their failure to do so, without a hearing on such contempt adjudication.

Respondents' contention is that the Supreme Court should strike appellants' appeal from the judgment of $475,000,000 against them, because appellant union has been adjudged guilty of contempt in superior court. Then, respondents contend, without inquiring as to whether there was jurisdiction or justification for the superior court adjudication, this court should enter its own coersive order in contempt proceedings without receiving any evidence, or conducting any hearing—without even making a determination as to whether the bonds to be transferred are, or have been, at any time material to this proceeding, in the possession or control of either of appellants. Such action, if pursued by this court, would deprive appellants of property without due process of law, and deny them equal protection of the law: *Hovey* v. *Elliott*, (1896) 167 U. S. 407, 17 S. Ct. 841, 43 L. ed. 215.

(b) Defensive *Right*, as distinguished from a privilege, may not be denied because of the contumacy of a [fol. 51] party

In support of their renewed motion to dismiss, respondents cite two cases to justify their position: *Hammond Packing Co.* v. *Arkansas* (1908) 212 U. S. 322, 29 S. Ct. 370, 53 L. ed. 530; and *Lawson* v. *Black Diamond Coal Mining Co.* (1906) 44 Wash. 26. The *Hammond* opinion was written by Mr. Justice White, who also wrote the opinion in *Hovey* v. *Elliot*, supra, 167 U.S. 407, cited by appellant in oral argument on May 16, 1952. The *Hovey* case holds that it is a deprivation of property without due process to withhold a defensive right from a party as punishment for his contempt. The *Hammond* case recognized that rule, but de-

cided that *suppression of material evidence* by a party may constitutionally be treated as a default. It is *not* a punishment for contempt. Immediately following the language which respondents quote from the *Hammond* case, Justice White said:

> "In its ultimate conception, therefore, the power exerted below was like the authority to default . . . because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering . . . ."

The justice cites the *Lawson* case with approval, recognizing the distinction between the situations involved in the *Hovey* and *Hammond* cases.

This court stated in the *Lawson* case, after discussing the right to dismiss under the appropriate statute, at 32:

> "But, if there are numerous issues in a case, and a discovery is sought only as to one of these issues, the striking of the answer and taking of judgment on all the issues . . . can only be justified on the theory that the judgment is given as a punishment . . . and it may well be doubted whether such a proceeding can be sustained under the authorities above cited." [which included the *Hovey* case.]

This distinction was again emphasized in the recent case of *Duell v. Duell* (CADC 1949), 178 F. (2d) 683, 14 ALR (2d) 560, at 566. The annotation to the *Duell* case collects all [fol. 52] the cases and demonstrates beyond doubt that the *Hovey* case still represents rule. (See particularly, 14 ALR (2d) at p. 586-593).

(c) The statutory method of coercion is exclusive. This court, in *In re Coulter* (1901), 25 Wash. 526, stated a well recognized rule at 528-529:

> "While the power to punish for contempt is inherent in all courts . . . it is . . . in its nature, arbitrary, capable of abuse . . . While the legislature may not lawfully take away this power altogether, it can, undoubtedly, to prevent its abuse, and to preserve the just rights of the individual, reasonably limit its exercise; that is to say, *it can* declare what acts or omis-

> sions shall constitute contempt, *define the character, and limit the amount of punishment that may be inflicted. . . . the statute is imperative.* (emphasis supplied.)

This rule is one of long standing in this state. Contempt actions must be brought in the precise manner prescribed by statute. A court cannot suspend an attorney from the practice of law, for example, or require him to apologize for statements made to the court: *State ex rel Martin v. Pendergast* (1905) 39 Wash. 132. Except as to contempt committed within the immediate view and presence of the court, the legislature has directed that the contemnor "be punished *as provided in this chapter.*" (emphasis supplied) (RCW 7.20.090)

The Judge may prescribe punishments for contempts committed within the immediate view and presence of the court, but for all other contempts, including that involved here, punishment is limited to the methods provided by statute. A careful study of the statutory provisions will reveal that dismissal of an appeal is not one of the modes of punishment prescribed.

The seemingly contrary result reached in *Pike v. Pike* (1946) 24 Wn. (2d) 735 is clearly explained by the court's language in that case, at 742:

> "The reason upon which the rule in criminal appeals is founded [that such appeals will be dismissed where the prisoner has escaped from custody] applies in the instant case. Due to the contumacy [of appellant] . . . that portion of the decree relative to the care, [fol. 53] control, and custody of the children cannot be executed."

Thus, the particular act of contumacy involved in this case (secreting the children whose custody was the subject matter of the appeal) deprived the court of *power to make effective disposition of the case.* Its judgment on appeal would be rendered nugatory unless the children were brought out of hiding.

Respondents Are Attempting to Impose a Partial Supersedeas (More Than ⅔ of a Judgment Totalling $475,000) as a Condition for the Right of Appeal.

To supersede the judgment in this case, appellants would have to post a bond of $950,000. (Appellant union consists of only 6,000 members altogether. Appellant Harris is an individual member of the union.)

Having failed to supersede, appellants were undoubtedly subject to the levy of execution by respondents, and to the institution of proceedings supplemental thereto. Virtually all property of appellant union is situated in California. That state is required to give full faith and credit to judgments of the State of Washington under Article IV, Section 1, of the United States Constitution. Thus, respondents have, and have had, a full, complete and adequate remedy at law, which they have failed to pursue.

No evidence was ever received that appellant union actually owned, or controlled bonds or other assets in the amount or of the kind described in the order of February 15, 1952. The only evidence was a financial report indicating that at some time during the previous fall the union had had bonds in that amount.

The purpose of supplemental proceedings is to discover and apply assets of the judgment debtor to the satisfaction of the judgment. Until the present motion of respondents, the supplemental proceedings have properly been attempts [fol. 54] at execution. Now respondents ask this court to enter an order "directing the Superior Court not to authorize any payment or distribution to creditors by the receiver until further order of this Court." The essence of the supplemental proceedings would be lost. The *supposed* assets are not to be applied to the judgment. The bonds would become, in effect, a partial supersedeas. The only difference between the proposed order and a supersedeas would be (1) the receiver, instead of the Clerk of the Court, would hold the bonds; and (2) the amount posted would be $298,000, instead of $950,000.

By requesting this, respondents are asking this court to require appellant union to choose between abandoning their legal right of appeal, or accepting an unprecedented condition for an appeal, not warranted by statute or rule of

court. Since appellant union alone must meet this new condition, or abandon its right of appeal, it, and appellant Harris, are denied the equal protection of the laws.

Respondents request this court to make an *ad hoc* amendment to its rules, and to the statute granting all parties an appeal in the mode prescribed by the court rules.

This Court Should Refuse to Enter Any of the Supplemental Orders Requested by Respondents

(a) These motions are inconsistent with respondents' motion to dismiss Cause No. 32180, for the reasons discussed in the brief submitted this day in that cause.

(b) Appellant union has not been properly served. Appellants, for Cause No. 32180, are before this Court. This does not mean, however, that respondents have met the jurisdictional prerequisites for evoking the additional process of this court.

Respondents rely entirely upon *Pike v. Pike*, supra, (1946) 24 Wn. (2d) 735 for their claim that the appellant union is [fol. 55] before this court, and may be ordered to turn over the bonds described in the order of the Superior Court.

The *Pike* case held that, pending appeal, service of process upon counsel for the appellant, was adequate service upon appellant. In the present case, however, counsel served while representing the union generally in the main appeal, have never had authority to represent appellant union in the supplemental proceedings, except to appear specially. While the requested orders are made in a motion under Cause No. 31984, the subject matter of the orders is based upon the jurisdiction of this court in Cause No. 32180.

It is submitted, therefore, that unless the appellant union is properly served, this court lacks jurisdiction of the person of the association to order it to do as requested by respondents.

Conclusion

In Re Van Alstine (1899) 21 Wash. 194, quoted the following with approval at 200:

> "No jurisdiction to compel the payment of an ordinary money demand, unconnected with such peculiar

equities, ever exested in chancery courts, nor had they the power to compel such payments by punishing the refusal to pay under the guise of contempt."

The Court concluded that:

". . . the superior court . . . was without power to require the petitioners to pay into court the money decreed to be due the defendant, and to enforce its payment by imprisonment."

In the *Van Alstine* case imprisonment was the punishment sought to coerce payment of a money judgment. Here, the punishment is the stripping of appellant of his right to appeal, and compelling him to accept the judgment of the superior court.

The punishments differ, but the principle is the same. In neither case does the court have the power to engraft a new punishment for contempt on the punishments prescribed by the legislature.

[fol. 56] The motions of respondents should be denied, and the case recalendared for hearing on appeal.

Respectfully submitted, John Caughlan, Siegfried Hesse, John F. Walthew, on behalf of counsel for Appellants.

[fols. 57-60] In Supreme Court of Washington

Excerpt from Motion Docket

Date, June 13th, 1952. Department 1

Title of Action: No. 31984. (2). George Arnold, et al., Respondents., vs. Nat'l Union of Marine Cooks & Stewards Assn. et al., Appellants.

Attorneys: Bassett, Geisness & Vance. Walthew, Gershon, Oseran & Warner, John Caughlan.

Motion and Supplemental Motion for Dismissal of Appeal. Held in Abeyance. E. W. Schwellenbach, C. J. Jun. 13, 1952.

[fol. 61] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

MOTION FOR LEAVE TO FILE AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL—Filed May 1, 1953

Come now the respondents in the above entitled cause and move the court for leave to file the affidavit of H. J. Schuchard in further support of respondents' motion to dismiss the above appeal. A copy of said proposed affidavit is attached hereto.

Bassett, Geisness & Vance, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 62] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

AFFIDAVIT OF H. J. SCHUCHARD IN SUPPORT OF MOTION TO DISMISS APPEAL

STATE OF WASHINGTON,
County of King, ss:

H. J. Schuchard, being first duly sworn, on oath deposes and says:

Affiant is one of the respondents in the above entitled cause.

Affiant has seen a copy of the "Voice", a newspaper published by the appellant National Union of Marine Cooks & Stewards Association, dated March 13, 1953. On page two of said newspaper is published a financial report of said appellant for the period from December 27, 1951, to December 31, 1952, which said report shows total receipts of $413,280.90, and total disbursements of $633,391.10, and shows total cash assets at the end of said period of only $90,389.84.

Affiant further alleges that by common report upon the waterfront of the City of Seattle a new union will shortly commence a "raid" upon said appellant union with the support and cooperation of the officers of said appellant union so that the members of the appellant union will become members of said new union. Affiant is informed and believes that said report is likewise a common report in San Francisco, California, and in other Pacific Coast ports. Affiant is also informed and believes that at a meeting of appellant union April 16, 1953, or April 23, 1953, Robert [fols. 63-64] (Bob) Ward, General Agent in Seattle for the appellant union ("Port Agent") stated to the members present, in substance, that the officers of appellant union had said before and still said that respondents would never collect any money from appellant union, although it would be necessary to "pick up the pieces" in a new union.

H. J. Schuchard.

Subscribed and sworn to before me this 29th day of April, 1953. John Geisness, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 65] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31984

[Title omitted]

AFFIDAVIT OF H. J. SCHUCHARD IN SUPPORT OF MOTION TO DISMISS APPEAL—Filed May 27, 1953

STATE OF WASHINGTON,
County of King, ss:

H. J. Schuchard, being first duly sworn, on oath deposes and says:

Affiant is one of the respondents in the above entitled cause.

Affiant has seen a copy of the "Voice", a newspaper published by the appellant National Union of Marine Cooks &

Stewards Association, dated March 13, 1953. On page two of said newspaper is published a financial report of said appellant for the period from December 27, 1951, to December 31, 1952, which said report shows total receipts of $413,280.90, and total disbursements of $633,391.10, and shows total cash assets at the end of said period of only $90,389.84.

Affiant further alleges that by common report upon the waterfront of the City of Seattle a new union will shortly commence a "raid" upon said appellant union with the support and cooperation of the officers of said appellant union so that the members of the appellant union will become members of said new union. Affiant is informed and believes that said report is likewise a common report in San Francisco, California, and in other Pacific Coast ports. Affiant is also informed and believes that at a meeting of appellant union April 16, 1953, or April 23, 1953, Robert [fols. 66-71] (Bob) Ward, General Agent in Seattle for the appellant union ("Port Agent") stated to the members present, in substance, that the officers of appellant union had said before and still said that respondents would never collect any money from appellant union, although it would be necessary to "pick up the pieces" in a new union.

Mr. Henry J. Schuchard.

Subscribed and sworn to before me this 29 day of April, 1953. John Geisness, Notary Public in and for the State of Washington, residing at Seattle.

Copy Received. Date, 4-30-53. Firm, Caughlan & Hesse. By V. Bazant.

Received Apr. 29, 1953. Walthew, Gershon, Oseran & Warner.

ZT

[fol. 72] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31,984

[Title omitted]

AFFIDAVIT OF ROBERT WARD IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE ADDITIONAL AFFIDAVIT—Filed May 22, 1953

STATE OF WASHINGTON,
County of King, ss:

Robert Ward, being first duly sworn, on his oath deposes and says:

I am the Seattle Port Agent of the National Union of Marine Cooks & Stewards Association, one of appellants herein, and make this affidavit in opposition to respondents' motion for leave to file the additional affidavit of H. J. Schuchard, in support of their motion to dismiss the within appeal.

I am familiar with the workings and operations of appellant Union, and I am familiar with the financial statement referred to by affiant Schuchard. The figures cited by the affiant Schuchard relating to the receipts and disbursements of the Union for the year 1952 are true; the financial report further discloses, however, that the principal disbursement (in the sum of $241,531.31) for the period encompassed, and which is responsible for the deficit for that year, is for "education, publicity, newspaper, legal, accounting, research, legislative, S. U. P. raid, NLRB, etc." The other disbursements are all the usual disbursements [fol. 73] of the appellant Union. The necessity of the disbursement above specified was necessitated by the relentless and extreme attacks upon appellant Union emanating from the Sailors Union of the Pacific, and its continuous attempts to supplant the appellant Union as the collective bargaining agent for the stewards department upon the West Coast ships. This not only includes the costs of the within action, and the companion case, #32180, but also includes numer-

ous NLRB petitions, hearings, and the like. Further, in order to defend itself, the appellant Union has, of necessity, been obligated to undertake an extremely massive and expensive educational and publicity campaign among its members.

With regard to the remainder of the affidavit of H. J. Schuchard, and on the basis of the information which I have received as Seattle Port Agent, I must categorically deny any allegations or inferences that the appellant Union is seeking to dissipate its assets. Appellant Union has sought aid from all maritime unions, who will assist it in maintaining appellant's collective bargaining rights; such assistance is, in no manner whatsoever, related to or motivated by any attempt to dissipate or disburse any assets of the appellant Union.

Further, I never made the statement referred to by affiant Schuchard. I have examined the minutes of both April 16, 1953 and April 23, 1953, and no such statement in substance, or in specific language, appears therein. [fols. 74-78] Finally, upon the basis of official communications received from the national officers of the appellant Union, I have been informed that the respondents herein have brought action, and are presently engaged in protecting their interests in any assets which the appellant Union has. All of the principal assets of the Union are located in San Francisco, California, and it is there that respondents are pursuing their remedies pursuant to the procedural and substantive rights guaranteed them by the laws of the State of California.

Robert Ward.

Subscribed and sworn to before me this 21st day of May, 1953. John Caughlan, Notary Public for the state of Washington residing in Seattle. (Notarial Seal.)

[fol. 79] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31,984

[Title omitted]

MOTION TO DOCKET THE APPEAL OF JOSEPH HARRIS FOR HEARING—Filed June 11, 1953

Comes now the appellant, Joseph Harris, by and through his attorneys, the undersigned, and hereby moves the above entitled court for an order docketing his appeal and setting the same for oral argument as soon as is practicable. This motion is based upon the files and records herein, upon the affidavit of Joseph Harris attached hereto and made a part hereof, and upon the brief being submitted herewith.

John Caughlan, Siegfried Hesse, Attorneys for Appellant, Joseph Harris.

STATE OF WASHINGTON,
County of King, ss:

Joseph Harris, being first duly sworn, on his oath deposes and says: I am one of the appellants in the above entitled cause, and make this affidavit in support of my motion for the separate docketing and hearing of my appeal.

[fol. 80] On the 5th day of September, 1951, a judgment was entered against me, in my individual capacity, in the sum of $475,000.00. Notice of appeal was timely filed and my appeal was otherwise perfected.

On September 5, 1951, another judgment was also entered against the National Union of Marine Cooks and Stewards from which it took an appeal. The union's appeal and mine were joined together solely for the convenience of court and counsel since both judgments appealed from were rendered at the same trial and were based upon one set of findings of fact and conclusions of laws. However it must be remembered that there were two separate judgments and two separate appeals. In this motion I am concerned with the individual judgment against me and the fate of my own personal appeal.

Both appeals were originally set for oral argument on May 22, 1952. Prior to that date, however, it appears that the appellant union was adjudged in contempt by the Superior Court for its refusal to comply with an order issued in proceedings supplemental to the judgment of September 5, 1951. I was not involved in those proceedings at all.

Based upon that adjudication, the respondents served upon my attorneys on April 17, 1952, a motion to dismiss my appeal. This motion was resisted, and, on May 17, 1952, after hearing oral argument on this motion, this court struck from the calendar the hearing on both my appeal [fol. 81] and the appeal of the appellant union, reserving action on the motion to dismiss the appeals until determination of the appellant union's appeal from the adjudication of contempt heretofore mentioned. Although I personally have done nothing to justify dismissal of my appeal, action upon my appeal has been held in abeyance ever since.

On May 26, 1953, this court filed an opinion in Cause No. 32180, to which I am not and never have been a party, in which it affirmed the adjudication that the appellant union was in contempt of court. That opinion concludes with the following language:

> "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

As has been pointed out above there are two separate appeals "in the main action," one of which, my own, is not in any way involved in the contempt proceeding.

Respondents' motion to dismiss seems directed indiscriminately at both my appeal and the appeal of the appellant union, although respondents never undertook supplementary proceedings against me. Furthermore, the court's language quoted above ("the appeal . . . in the main action") is ambiguous. I am therefore presenting this motion to clarify my status as a litigant before this court.

[fols. 82-85] It seems obvious that the court did not intend to dismiss my appeal, for, I have not violated or disobeyed any court orders, and the respondents have never asserted that I have conducted myself in any manner whatsoever that would justify the dismissal of my separate appeal.

For almost two years I have had outstanding against me a judgment in the sum of $475,000.00. This judgment I respectfully submit should be, and will be, upon the hearing of the merits, reversed as contrary both to the facts and the applicable law. In the meantime, however, it subjects me to the garnishment of my wages, the attachment of my property and other potential harrassment. It is for these reasons that I am extremely anxious to have my appeal heard upon the merits in order that I may have this judgment of $475,000.00 reversed.

I therefore respectfully urge that this court docket my appeal for oral argument forthwith, irrespective of whatever action this court may deem fit and proper with regard to the appeal of the other appellant.

Joseph Harris.

Subscribed and sworn to before me this 10th day of June, 1953. John Caughlan, Notary Public for the state of Washington residing at Seattle. (Notarial Seal.)

[fols. 86-87] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

MOTION TO DOCKET APPEAL FOR ARGUMENT, OR IN THE ALTERNATIVE TO STAY PROPOSED DISMISSAL OF APPEAL—Filed June 11, 1953

Comes now appellant union, and moves the above entitled court for an order docketing the above entitled appeal for argument, or, in the event said motion is denied, for an order staying the proposed dismissal of said appeal.

This motion is based upon all the files and records herein

and in case numbered 32180, in the files of the above entitled court, and upon the brief being submitted herewith.

Walthew, Oseran & Warner, Attorneys for Appellant Union.

[File endorsement omitted.]

[fol. 88] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

BRIEF IN SUPPORT OF MOTION TO DOCKET APPEAL FOR ARGUMENT, OR IN THE ALTERNATIVE, TO STAY PROPOSED DISMISSAL OF APPEAL—Filed June 11, 1953

This is the only motion which appellant union is filing in this case. All of the other motions that appellant union is this day filing are being filed in Case No. 32180. This appellant's reference in this motion and brief to Case No. 32180 and to the records in that case, is not to be deemed a waiver of the point that appellant makes in that case (as it does in this) that this court had no authority in that case to make any order effecting appellant's rights in this one. The reference is simply for convenience and in order to avoid the necessity of setting out at length here again matters already known to this court by virtue of their presence in the files of another case.

As pointed out in the briefs filed in support of the various motions this date being filed in Case No. 32180, the judgment in that case is far from final. Appellant in that case has at least two more steps which are legally open to it—a petition for rehearing here and an application to the Supreme Court of the United States for certiorari—before the judgment in that case becomes final. Certainly, therefore, to the extent that this court proposes to predicate an order in this case upon a failure to comply with a condition in that one, this court should defer action here until its judgment there is final. Furthermore, as is in the aforesaid briefs also pointed out, this court has no authority to act in this case [fol. 89] without notice and hearing to appellant here; the

submission in the other case did not embrace the issue of the disposition of the appeal in this one. Finally, as is in those same briefs pointed out, this court has no authority to punish a contempt by the dismissal of an appeal. Such punishment is precluded by the statutes of this state and does not exist at common law.

In addition to the foregoing, the record before the court in this case—including the briefs on file herein—shows that appellant has valid and meritorious grounds of appeals, that the judgment below in this case is clearly in error and must be reversed. (It may be observed parenthetically that respondents' efforts to get the appeal here dismissed demonstrate that respondents recognize the impregnability of appellant's position on this appeal and are afraid to have this court pass on the merits of the appeal). This court therefore ought not, in the face of the total lack of authority for its proposed action, deny to appellant its right to be heard here on the merits. To do so is to deny to appellant due process of law. *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215.

Furthermore, this case is simply one in which a respondent has an unsatisfied money judgment. It is nothing more. If this appeal can be dismissed because appellant has not superseded that judgment, then any appeal can be so dismissed. All a successful plaintiff need do, is follow the course taken by respondents here and no appeal would be safe from dismissal in this court. This court has never held in any other case that an appeal of a judgment debtor will be dismissed when he has not superseded the judgment or partially satisfied it pursuant to an order of the court from which the appeal is taken. We do not understand this court to be enunciating such a sweeping rule now. Such a rule would destroy the statutory right to an appeal— and only the Legislature can do that. Yet, that would be the effect [fol. 90] of the dismissal of the appeal here, if a general rule of law is being established in this case.

If, on the other hand, the rule is to apply only to this judgment debtor, then this would be a clear denial of the equal protection of the laws which the federal constitution guarantees to this appellant. That this appellant is a trade union which, at the moment, may or may not enjoy popu-

larity with the members of this court is beside the point. That fact affords no basis for treating appellant differently from any other litigant before this court.

For these reasons, the appeal here should not be dismissed. This court should forthrightly face up the issues posed by the appeal on its merits. We are confident, that if it does, the judgment below will be reversed and the whole sorry story of this litigation brought to an end.

We pray that the court docket the appeal for argument on its merits at the earliest possible opportunity.

Respectfully submitted, Walthew, Oseran & Warner, Attorneys for Appellant Union.

[File endorsement omitted.]

[fol. 91] In the Supreme Court of the State of Washington

[Title omitted]

Motion to Dismiss—Filed June 12, 195.

Comes now the respondents in the above-entitled cause and move the Court that the appeal now pending from a judgment of the Superior Court made and entered September 5, 1951, be dismissed, with prejudice, in accordance with the opinion and order of this Court dated May 26, 1953, for the reason that appellants have altogether failed to purge the appellant union of its contempt within fifteen (15) days from the date of the remittitur in cause No. 32180, records and files of this Court, and respondents further move that the remittitur go down forthwith.

This motion is based upon the records and files herein and upon the affidavit of counsel for respondents hereto attached.

Bassett, Geisness & Vance, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 92] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

Samuel B. Bassett, being first duly sworn, upon oath, deposes and says:

Affiant is one of the attorneys for respondents in the above-entitled cause and upon the above-numbered appeal.

The appellants have altogether failed to deposit Government bonds in the amount of $298,000.00, or any other securities, money, or other property with the receiver appointed by the Superior Court of the State of Washington, and have not, in whole or in part, purged themselves of the contempt mentioned in the opinion and order entered upon the appeal to this Court in the above-entitled cause, under number 32180. In said cause number 32180, before this Court, the remittitur went down May 26, 1953, and has never been recalled.

An emergency exists because the appellant union is rapidly dissipating its assets. On September 26, 1951, said appellant owned cash and liquid securities in the approximate amount of $360,011.58, according to its own financial report. According to a report published by said appellant under date of March 13, 1953, said appellant, during 1952, expended approximately $238,000.00 more than it received and its "cash assets" (broadly described in said report as "cash, investments, etc.") amounted to only $90,389.00 at the end of 1952. All of its assets of substantial value are in [fols. 93-96] California and two California courts have refused to entertain suit on the Washington judgment while this appeal is pending. The other appellant has no known assets and certainly has no assets of material value in relation to the amount of the judgment herein. Nothing whatsoever, has been paid upon said judgment.

Samuel B. Bassett.

Subscribed and sworn to before me this 12 day of June, 1953. John Geisness, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

[fol. 97] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

BRIEF OF RESPONDENTS UPON PENDING MOTIONS

The following motions are pending before the court and are noticed for hearing June 26:

(1) Respondents' motion to dismiss appeal;
(2) Appellants' motion to docket appeal for argument or, in the alternative, to stay proposed dismissal of appeal; and
(3) Motion to docket the appeal of Joseph Harris for hearing.

These motions will be discussed in the above order.

(1) Respondents' Motion to Dismiss Appeal:

This motion, supported by affidavit, asks that the appeal in the above case be dismissed and the remittitur sent down immediately.

On May 25, 1953, an opinion was filed by this court in Cause No. 32180, (Arnold v. National Union of Marine Cooks and Stewards Association, 142 Wn. Dec. 590) which concluded:

> "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed, unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

No. 32180 is an appeal from adjudication of contempt entered in supplemental proceedings to enforce the judgment from which the appeal in 31984 is taken. The affidavit filed in support of respondents' motion to dismiss the appeal shows that the appellant union has failed to purge itself of the contempt and that more than fifteen days have expired [fol. 98] from the date of the remittitur.

The affidavit filed in support of the motion to dismiss

clearly shows that an emergency exists. According to its own records and reports, the appellant union depleted its cash and liquid securities from $360,011.58 in September, 1951 to $90,389.00 at the end of 1952. The judgment of respondents is for the total sum of $475,000.00. This judgment is wholly unsatisfied. Two California courts have refused to entertain suits on the Washington judgment while the appeal is pending to this court. The other appellant, Harris, has no assets of material value in relation to the amount of the judgment herein. An affidavit filed by respondents in No. 31984 indicates the organization of a new union to displace the appellant union.

In short, directly contrary to the earlier protestations of the appellant union, through its counsel, there has been in operation a scheme to dissipate completely the assets of the appellant union and then to allow it to be displaced by a "new" organization. The effectuation of this scheme has required contemptuous disregard of the order of the superior court that bonds of the appellant union be delivered to the court-appointed receiver. We respectfully submit that the judgment of dismissal should become final at the earliest possible date, pursuant to Rule 15 of the Rules Peculiar to the Business of the Supreme Court. In recognition of the emergency, the court, in No. 32180, entered an order that the remittitur go down immediately, and the same emergency exists as to the present motion for an order dismissing the main appeal.

(2) Appellants' Motion to Docket Appeal for Argument or, in the Alternative, to Stay Proposed Dismissal of Appeal.

This motion is simply a request that the court accord the appellant more time in which to effectuate fully its contemptuous scheme. The appellant union speaks of its constitutional rights, but it has no constitutional right to emasculate the judicial system. The courts of this state [fol. 99] have inherent authority to protect themselves against impairment of their powers to discharge their duties as constitutional courts. *Blanchard v. Golden Age Brewing Company*, 164 Wash. 140, 2 P. (2d) 79. Courts have inherent power to effectuate their judgments. *14 Am. Jur.* 370, Section 171; *14 Am. Jur.* 373, Section 174.

The appellant union demands due process of law. The due process clause was not intended as a weapon to subvert the judicial process, but the broad issue thus suggested need not be argued because "due process does not comprehend the right of appeal". *District of Columbia v. Clauans 300 U.S. 618, 81 L. Ed. 843, 847.*

12 Am. Jur. 328, Section 638;
Reetz v. Michigan, 188 U.S. 405, 47 L. Ed. 563;
Pittsburgh C.C. & St. Louis RR. Co. v. Backus, 154 U.S. 421, 38 L. Ed. 1031.
McKane v. Durston, 153 U.S. 684, 38 L. Ed. 867.

In *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, upon which appellants base their constitutional claim, the Supreme Court of the United States expressly pointed out (L. Ed. p. 230) that its decision was not applicable to a case such as the instant case:

> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us."

Even if the due process clause were applicable, the conduct of the appellant union operates as a conclusive admission that the appeal is without merit. As we have pointed out in our brief on the pending motion in No. 32,80, an admission of this sort may be given full effect without violence to the due process clause, even where the result is to deny a hearing altogether.

[fol. 100] *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L. Ed. 530 (1909);
Lawson v. Black Diamond Coal Mining Co., 44 Wash. 26 (1906).

Appellants suggest that respondents' motion to dismiss the appeal is an admission that the judgment is not sustainable. This is absolutely groundless, because we long ago suggested that the bonds be held by the receiver pending the outcome of the appeal, (Respondents' Brief in Support of Supplemental Motion for Dismissal of Appeal, filed June 10, 1952) and have been at all times perfectly willing to proceed with the appeal if appellant complies with the order of the court requiring delivery of the bonds to the receiver. Our motion evidences an interest in stopping the dissipation of assets during an appeal in which appellant itself has no confidence. Obviously, appellant thinks very little of its appeal or it would not consider it necessary to flaunt the court's order and dissipate a substantial treasury to forestall collection of the judgment.

It is argued that, if the court is consistent in other cases, the effect of dismissing this appeal will be to require supersedeas, or partial satisfaction of judgment, in all cases as a condition of appeal, and "destroy the statutory right of appeal". From this gratuitous assumption appellant moves to an intimation that the court may discriminate against appellant by reason of prejudice on the part of the court (last page of Brief in Support of Motion to Docket Appeal for Argument, or in the Alternative, to Stay Proposed Dismissal of Appeal). This suggestion is in itself a contempt of this court, aggravated by the fact that the insinuation is built up from the gratuitous assumption hereinabove mentioned, which casts doubt upon the sincerity of the aspersion. Neither respondents nor the court have suggested that appellants be required to supersede, or partially satisfy the judgment, as a condition of appeal. Respondents, the trial court, and this court in No. 32180, have simply [fol. 101] treated appellant as subject to ordinary procedures for enforcement of the judgment in the absence of supersedeas. And in this it is treated as all judgment debtors. The union forfeits the appeal through *contempt*, not for mere failure to supersede or satisfy the judgment.

In No. 32180 appellant claimed a special immunity because it is a voluntary association, and this special immunity was denied. This court has taken the only possible effective action to terminate a travesty in which appellant is appeal-

ing on the one hand and, *in contempt of court*, dissipating its assets to render itself judgment proof on the other hand. The remarkable complaint is now raised that this court is destroying the right of appeal.

(3) Motion to Docket the Appeal of Joseph Harris for Hearing:

In the affidavit supporting this motion it is alleged that there are "two separate appeals". This is not true. There was one notice of appeal, one bond and one brief of appellants. The statutes (R.C.W. 4.88.040) provides that all parties whose interests are similarly affected by a judgment may join in a notice of appeal or may serve independent notices of appeal. The appellants chose to engage in a single joint appeal. Since Harris has voluntarily chosen to associate himself in a joint appeal he cannot now claim the rights of an independent and separate appellant, but must accept his co-appellant for better or worse. He is bound by statements made by his co-appellant in appellants' brief and by other statements and conduct affecting the single appeal.

The interdependence of the appellants was recognized by the appellants in "Answering Brief of Appellants upon Motion for Dismissal of Appeal", served upon respondents herein May 15, 1952, and filed with this court. Appellants there said "Nor can the union's brief be stricken (alternative relief asked by respondents) without also striking appellant Harris' brief". However, this does not mean that [fol. 102] the union's brief can not be stricken, but means, instead, that if the brief is stricken or the single appeal dismissed, there is no brief and there is no appeal.

We ask the court to bear in mind that the judgment against Harris, as hereinabove indicated, is not in itself a matter of importance to respondents. As far as respondents are concerned, the judgment below may be vacated as to him and the cause dismissed as to him, provided the judgment against the union is not impaired. So that there may be no question as to the respondents' good faith in making this statement, they now expressly consent to the entry of a final order by this court dismissing the appeal, directing that the judgment below be vacated as to Harris and the cause dismissed, without prejudice, as to him, and adjudging that

such vacation and dismissal shall not impair the judgment as to the appellant union, which shall remain in full force and effect. This would put each appellant in the position he would find himself if the union had been sued alone.

The important thing is that appellant union be precluded from using the procedures of this court, forbidden to it, through the device of using Harris in its stead. Such a use of Harris was suggested in the brief of appellants hereinabove mentioned, served upon respondents May 15, 1952, where appellants said:

> "If Harris should prevail, the basis of the union's liability would be gone. Since this is the case, the dismissal of the union's appeal would actually accomplish nothing."

Should Harris, contrary to our contention, be allowed to proceed as though he in fact had taken a separate appeal, we ask that stringent provision be made so there may be no possibility that the appellant union can use him as an instrument through which it may pursue an appeal forbidden to it. For this purpose, and so that there may be no further question as to the finality of the judgment below, we suggest that this be accomplished by provision in the order and [fols. 103-105] judgment of the court that the judgment against the appellant union is final and that no further proceedings in the cause by the co-appellant Harris shall enure to the benefit of the union.

Conclusion

It is desirable, and timely, we think, to discourage the practice of perverting constitutional and other legal guarantees to stultify the courts and tread rough-shod over the rights of other parties. Such results certainly were not contemplated by the authors of the Constitution and tend to diminish respect for our judicial system and laws.

Respectfully submitted, Bassett, Geisness & Vance,
Attorneys for Respondents.

[fol. 106] In Supreme Court of Washington

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Motion Docket Entries

Date, Friday, June 26, 1953. Department II.

Title of Action: No. 31984. (4). George Arnold, et al., respondents vs. Nat'l Union Marine Cooks—Joseph Harris, Appellants.

Attorneys: Bassett, Geisness & Vance. John Caughlan, Siegfried Hesse (For Harris).

Motion to Docket Appeal of Joseph Harris for Hearing. June 27, 1953. Granted, Grady, C. J.

Supreme Court, Motion Docket, 149

Date, Friday, June 26, 1953. Department II.

Title of Action: No. 31984. (5). George Arnold, et al., Respondents, vs. National Union Marine Cooks, etc., et al., Appellants.

Attorneys: Bassett, Geisness & Vance. Walthew, Oseran & Warner, John Caughlan, Siegfried Hesse.

Motion to Docket Appeal for Argument, Alternative Stay, Proposed Dismissal of Appeal. June 27, 1953. Denied, Grady, C. J.

No. 31984. (6). George Arnold, et al., Respondents, vs. National Union Marine Cooks, etc., et al., Appellants.

Bassett, Geisness & Vance. Walthew, Oseran & Warner, John Caughlan, Siegfried Hesse.

Motion to Dismiss. June 27, 1953. Granted, Grady, C. J.

Motion Docket Entries.

Motion Docket 10, pages 148 and 149.

Office of Clerk of Supreme Court.

[fol. 107] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER OF DISMISSAL—July 3, 1953

The above-entitled cause coming before the court on Friday, June 26, 1953, upon the motion of respondents for the entry of an order dismissing the appeal of appellants now pending here, and it appearing to the court that heretofore the appellant union was adjudged in contempt of the superior court, and this court in its opinion in Cause No. 32180 having informed it that its appeal in this cause would be dismissed unless within fifteen days of the date of the remittitur therein the appellant union purged itself of the order of contempt by complying with the Order of the Superior Court, and it further appearing to the court that the appellant union has not purged itself of such contempt by complying with such order within the time prescribed or at all,

It is therefore ordered that the appeal of National Union of Marine Cooks & Stewards Association be and the same is hereby dismissed because of its failure to purge itself of contempt of court.

Dated this 3d day of July, 1953.

By the Court: Thomas E. Grady, Chief Justice.

[File endorsement omitted.]

[fol. 108] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING—Filed July 31, 1953

The above named appellant, National Union of Marine Cooks & Stewards Association, hereby respectfully petitions the above entitled court for a re-hearing of the order entered on July 3, 1953, dismissing its appeal for its failure to purge

itself of contempt of the Superior Court of King County. This petition is based upon the following legal grounds:

It Is a Denial of Due Process of Law Guaranteed by the Fourteenth Amendment of the Constitution of the United States to Deprive the Appellant of a Defensive Right by Striking Its Appeal from the Within Judgment.

The statutes of this state (RCW 4.88.010), and the rules of this court (Rules on Appeal, Rule 14, 34A Wash. (2d) 20), both grant the appellant the right of appeal from the within judgment.

The Supreme Court of the United States in *Hovey v. Elliott*, 167 US 407, held that to deprive a party litigant of its defensive rights was a denial of due process of law as guaranteed by the Fourteenth Amendment and, therefore, a sister state need not give any judgment, based upon such a denial, full faith and credit. The respondents herein have relied primarily upon the case of *Hammond Packing Co. v. Arkansas*, 212 US 322, in which the Supreme Court of the United States affirmed a judgment based upon a default, entered after a party litigant refused to give testimony and produce documents pursuant to a court order.

The distinction betwen the within case and the facts presented in the *Hammond* case, supra, is that the appellant herein has not been held in contempt for suppression of material evidence. This distinction is crucial, and has been [fol. 109] recognized repeatedly ever since the *Hovey* decision, supra. The Supreme Court of the United States, in fact, relied upon the decision of this court in *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, when it decided the *Hammond* case. The Circuit Court of Appeals for the District of Columbia in the recent case of *Duell v. Duell*, 178 F. (2d) 683, at 687, has expressly recognized this distinction:

> "The Hovey case holds it is a denial of due process to strip a defendant of his defenses as punishment for contempt. The Hammond opinion does not modify that rule; its holding is that, when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his

> answer which justified striking it from the record and rendering judgment as though by default."

The court went on to point out that the defendant had not suppressed or failed to produce material evidence and, therefore, the *Hammond* rule was inapplicable and the *Hovey* rule applied. The annotation of the *Duell* case in 14 ALR (2d) 566 demonstrates beyond all doubt that the *Hovey* case still represents the law. It is, therefore, respectfully submitted that to deprive the within appellant of its defensive right of appeal when said right is granted by statute and court rule, clearly deprives the appellant of its property without due process of law.

The Statutory Method of Coercion and Punishment for Contempt is Exclusive

This court has long recognized that, while the legislature cannot deprive the courts of this state of their inherent powers of contempt, it can properly limit the manner and scope of the exercise of those powers: *In re Coulter*, 25 Wash. 526, 528-529:

> "While the power to punish for contempt is inherent in all courts . . . it is . . . in its nature, arbitrary, capable of abuse. . . . While the legislature may not lawfully take away this power altogether, it can, undoubtedly, to prevent its abuse, and to preserve the just rights of the individual, reasonably limit its exercise; that is to say, *it can* declare what acts or omissions shall constitute contempt, *define the character, and limit the amount of punishment that may be inflicted . . . the statute is imperative.*" (Emphasis supplied).

[fol. 110] The legislature has provided that, except as to contempts committed within the immediate view of the court, punishment for contempt must be pursuant to Title 7, Chapter 20, of the Revised Code of Washington: RCW 7.20.090. A careful examination of that chapter discloses no provision, under any circumstances, when this court may deprive a litigant of its right to appeal because of contempt of court.

Moreover, the specification of the grounds for dismissal of an appeal, set forth in Rule 51, Rules on Appeal, 34A, Wn. (2d) 50, does not include contempt of court. It seems adequately clear, therefore, that without such statutory authority the order dismissing the within appeal of appellant is improper and without authority.

For the above and foregoing reason it is hereby respectfully submitted that this court should grant the within petition for a re-hearing and set the argument on re-hearing *en banc*.

Respectfully submitted, Walthew, Oseran & Warner, Attorneys for Appellant, National Union Marine Cooks & Stewards Association.

[File endorsement omitted.]

[fol. 111] In the Supreme Court of the State of Washington

[Title omitted]

Order Denying Petition for Rehearing—Filed August 19, 1953

The court having considered the petition of the appellant National Union of Marine Cooks & Stewards Association for a rehearing herein,

It is ordered that the petition for a rehearing be and it is hereby denied.

Dated this 19 day of August, 1953.

Frank P. Weaver, Acting Chief Justice.

[File endorsement omitted.]

[fol. 112] In the Supreme Court of the State of Washington

George Arnold, Alvin Bailey, John O. Baine, B. F. Barsett, Dale A. Becks, Don Bickford, Charles Birdsall, Elmer J. Blanes, George C. Boettger, Herman Bolst, Gerald Bosley, Carol E. Campbell, A. W. Charlesworth, Burr D. Cline, Joseph Cline, Robert Cooney, J. R. Costello, Harold S. Darling, George Davey, Eugene A. Douglas, Dean H. Douglas, Howard Dow, Clarence J. Dyer, Dewey Erlsein, Francis Forde, William Francis, Robert C. Friend, Robert Galbraith, William C. Game, Joseph Green, George Heard, Ernest Henry, Wilbur Higginson, Herbert Hill, T. J. Howard, William Jenkins, Robert Jewell, Edsel Johns, Arnold W. Johnson, Charles L. Johnson, Frank Johnson, A. L. Jones, Art D. King, Harold Krause, Harley E. Krone, Frank Lachica, William Lande, Percy Landrigan, Marvin E. Lantz, Louis Larsen, Cliff Lattish, Jose Llorente, Cy Lord, Norman Maginn, A. L. Makenson, J. Ralph Mann, Tony Manzano, Tom McCaffery, Hugh McIntyre, Thomas C. McManus, William B. Miller, C. C. Moody, Charles Mosher, Al Mundt, George O'Leary, Harold Paige, Bernard M. Paluck, Jack Patterson, Frank C. Ponce, Clarence Reese, C. Responte, Virgil Rogers, Jack Roper, Dan Rotan, Don Rotan, Clarence Rothaus, Mathias Sabo, H. J. Schuchard, Frank Schulpeck, Ernest Shearer, John Siewick, Gus Sinclair, A. Sirriani, Leslie Smith, John Smocsyk, Fred Starks, Les Taft, Jack Taylor, James Triana, Don W. Tyler, Daniel Varady, Pedro Villabol, Hubert Whaley, Al Baide, John Boers, Max Schlossel and Carl W. Singer, Respondents,

vs.

National Union of Marine Cooks & Stewards Association, a voluntary association, and Joseph Harris, individually, and as Seattle Business Agent of said voluntary association, Appellants

Judgment—August 19, 1953

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the

Court having fully considered the same and being fully advised in the premises, it is now, on this 19th day of August, A. D. 1953, on motion of Bassett, Geisness & Vance, of counsel for respondents, considered, adjudged and decreed, that the appeal of the National Union of Marine Cooks & Stewards Association from the judgment of said Superior Court be, and the same is, hereby dismissed with [fols. 113-115] costs; and that the said respondents as named above have and recover of and from the said National Union of Marine Cooks & Stewards Association, and from American Bonding Company of Baltimore, surety to the extent of $200.00, the costs of this action taxed and allowed at Three hundred twenty-two and 50/100 ($322.50) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 116] Clerk's Certificate to foregoing transcript omitted in printing.

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[117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

NATIONAL UNION OF MARINE COOKS & STEWARDS, Petitioner,

vs.

GEORGE ARNOLD, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of the petition for a writ of certiorari (and, in the event the petition be granted, for the purpose

of hearing and determining the case on the merits), the printed record shall consist of the following:

1. Judgment entered September 4, 1951 (Tr. 1-7).
2. Notice of Appeal to the Supreme Court (Tr. 8).
[fol. 118] 3. Adjudication of Contempt (Tr. 9-10).
4. Motion for dismissal of appeal, affidavit of John Geisness and Order of the Superior Court Appointing Receiver and Directing Transfer of Assets attached (Marked Exhibit A), (Tr. 11-17).
5. Answering Brief of Appellants Upon Motion for Dismissal of Appeal (Tr. 28-36).
6. Order dated May 17, 1952, and filed May 19, 1952 (Tr. 38-39).
7. Supplemental Motion for Dismissal of Appeal (Tr. 40-41).
8. Appellants' Brief in Opposition to Supplemental Moton for Dismissal of Appeal (Tr. 48-56).
9. Motion Docket Entry "Motion and Supplemental Motion for Dismissal of Appeal Held in Abeyance"—Motion Docket 10, page 91—6/13/52 Records Clerk of the Supreme Court (Tr. 57).
10. Motion for Leave to File Affidavit in Support of Motion to Dismiss Appeal (Copy of Affidavit attacied and made part of motion) (Tr. 61-63).
11. Affidavit of H. J. Schuchard in Support of Motion to Dismiss Appeal (Tr. 65-66).
12. Affidavit of Robert Ward in Opposition to Respondents' Motion for Leave to File Additional Affidavit (Tr. 72-74).
13. Motion to docket the Appeal of Joseph Harris for Hearing and affidavit of Joseph Harris. (Tr. 79-82).
14. Motion to Docket Appeal for Argument, or in the Alternative to Stay Proposed Dismissal of Appeal (Tr. 86).
15. Brief in Support of Motion to Docket Appeal for Argument, or in the Alternative, to Stay Proposed Dismissal of Appeal (Tr. 88-90).
16. Motion to Dismiss (Tr. 91).
17. Affidavit for Dismissal (Samuel B. Bassett) (Tr. 92-93).
[fol. 119] 18. Brief of Respondents Upon Pending Motions (Tr. 97-103).

19. Motion Docket Entries (Tr. 106).

20. Order of the Supreme Court dismissing the appeal of the National Union of Marine Cooks & Stewards Association (because of its failure to purge itself of contempt of court). (Tr. 107).

21. Petition for Rehearing (Tr. 108-110).

22. Order Denying Petition for Rehearing (Tr. 111).

23. Judgment of the Supreme Court entered Wednesday, August 19, 1953, (dismissing appeal of National Union of Marine Cooks & Stewards Association) (Tr. 112-113).

It is further stipulated and agreed that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

(S.) Norman Leonard, Counsel for Petitioner; Samuel B. Bassett, Counsel for Respondents.

Dated this 27 day of November, 1953.

[fol. 120] Supreme Court of the United States, October Term, 1953

No. —

National Union of Marine Cooks and Stewards, a voluntary association, Petitioner,

vs.

George Arnold, et al.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Jan. 16, 1954.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 6th day of November, 1953.

[fol. 121] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 529

NATIONAL UNION OF MARINE COOKS AND STEWARDS, a Voluntary Association, Petitioner,

vs.

GEORGE ARNOLD, et al.

ORDER ALLOWING CERTIORARI—Filed March 8, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.